# In the United States
# Circuit Court of Appeals
## For the Ninth Circuit

No. 6041

J. S. CVITKOVIC, MARTIN BOSKIVICH, NIKOLA JANDRILOVICH, and MARTIN BOSKOYCEK,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

# Appellants' Petition for Re-hearing



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# Appellants' Petition for Re-hearing

Come now the appellants and respectfully petition the Court to grant a re-hearing herein and upon such re-hearing, to vacate the opinion filed herein on the 9th day of June, 1930, and in support of their petition represent as follows:

I.

In the opinion filed we find the following statement:

> "Error is also assigned to the refusal of the Court to instruct the jury that a person could not be convicted of aiding and abetting the commission of the crime charged in the second count of the indictment. This Court has ruled otherwise. *Vutich vs. U. S.,* 28 Fed. (2nd) 666."

The decision cited supports the text, but that decision is unsound and untenable and is at variance with the decisions of three other circuits on the same question.

*Anderson vs. United States,* 30 Fed. (2nd) 485 (Fifth Circuit);

*Seiden vs. United States,* 16 Fed. (2nd) 197, (Second Circuit);

*Partsan vs. United States,* 7 Fed. (2nd) 804 (Eighth Circuit).

In the case first cited, *Anderson vs. United States,* it was held that while an employee may be guilty as an accomplice of making an illegal sale of liquor he cannot be regarded either as accomplice or principal in conducting a retail liquor business without having paid the license tax therefor. In the opinion in that case it was said:

> "One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice and therefore regarded as a principal in conducting a business unless he is in fact one of the proprietors whose duty it is to pay the license tax. *United States vs. Logan,* Fed. case No. 15624. We think, under the circumstances here disclosed, the refusal of the requested charge of the giving of the above quoted portion of the general charge constituted prejudicial error. *Rood vs. U. S.,* 7 Fed. (2nd) 45."

The requested instruction referred to in the opinion was identical with the instruction requested and refused in the present case.

In *Seiden vs. United States, supra,* it was held that the statute requiring the furnishing of the bond by a distiller is directed only against proprietors and has no application to the workmen or employees of such distiller. In the opinion in that case it was said:

> "Count three was for intending to commence or continue the business of distiller without a bond. This section was plainly directed only against the proprietor and a workman cannot commit it or abet it."

In *Partsan vs. United States, supra,* it was held that mere employees of a distiller could not be convicted for operating a still with the intent to defraud the United States of the tax on spirits. In the opinion in that case it was said:

> "The act of Congress under which he was indicted was a revenue act, the purpose of the section under which he was indicted was to prevent a distiller from defrauding the Government out of the tax upon the product which he manufactured, and the defendant's intent to defraud was a condition precedent to his commission of the offense the section denounces. Partsan had no interest in the property or the business he was in and would not be liable for the tax, because neither the plant nor the product, nor any part thereof, was or would be his property."

The second count of the indictment in this case charged the appellants with conducting the business of a distiller of spirits without first having given a bond to the Government. The uncontradicted evidence showed that they had no proprietary interest in the still or its product. The statute, as the authorities cited above point out, by its terms is plainly applicable only to the owner of distilleries. It was only such owner from whom the Government would accept a bond. When a criminal statute is limited by its terms to a certain class it should not be extended, by construction or interpretation, to include others not falling within the class designated. The statute requiring the giving of a bond by a distiller and making his failure to do so a criminal offense is still in force and effect, notwithstanding the adoption of the National Prohibition Act. So far as the record in this case is

concerned, the actual owner of the distillery in question may have given the required bond. At least, this Court has no right to assume, in the absence of evidence, that he had not done so. After a bond was given then the conviction of these appellants on the second count of the indictment cannot be sustained. But even though no bond was given the conviction should be set aside for the reason that the statute has no application to others than the owners and proprietors of a distillery. This was the rule adopted by the Federal Courts prior to the passage of the National Prohibition Act.

*United States vs. Logan,* Fed. cases No. 16624;
*United States vs. Cooper,* Fed. cases No. 14863.

and no Court except this Court has ever held to the contrary.

The decision of this Court in *Vutich vs. United States* is erroneous and should be promptly overruled.

We respectfully submit, for the reasons herein given, that a re-hearing be granted herein.

Respectfully submitted,

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*Attorneys for Appellants.*